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Civil Procedure 10/30

**Scope of Diversity Continued**

* **Now: scope in general**—otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.
* Work product privilege: **Hypo: TESTABLE FOR ESSAY QUESTIONS:** D Airlines flight 107 crashed, severely injuring a number of passengers, including P, X and Y. P, X, and Y each hire private investigators to interview witnesses to the crash and to interview D Airline employees who serviced the plane prior to the accident. Before filing suit, X settles with D Airlines. P brings a state-law negligence suit (in diversity) against D Airlines in the Federal District Court for the Southern District of New York. When X hears about P’s suit, X gives P the notes from the witness interviews generated by X’s private detective. Y has not yet brought suit, but when she hears about P’s suit, she too gives to P the notes from witness interviews generated by Y’s private detective. In discovery, D Airlines asks for the material that X and Y gave to P. *Is the material covered by the work product privilege and/or should it be?*
* **Here is the answer key from the blog:**
* **First of all, some of you argued that even if the material created by X’s and Y’s private investigators is privileged work product, the privilege was waived by virtue of being delivered to a third party (P). You were rewarded for worrying about this, although, in fact, giving material to someone who is not a coparty in the same litigation has generally been held to not waive the privilege, provided that the two share a litigation adversary. E.g. BASF Aktiengesellschaft v. Reilly Industries, 224 F.R.D. 438 (S.D. Ind. 2004).**
* **You were also rewarded for worrying about who controls the privilege if the material is work product. Is it controlled by P? By X and Y? By X’s and Y’s private investigators?**
* **But the real issue here is that Fed. R. Civ. P. 26(b)(3) defines work product as documents and tangible things prepared “in anticipation of litigation or for trial by or for another party or by or for that other party's representative.” The material was clearly prepared in anticipation of litigation, but not for a party, since the only parties in the case are P and D. The fact that the material was given to P does not mean it was prepared for P or by or for a representative of P.**
* **Of course, merely because the material does not fall under Rule 26(b)(3) does not mean it is not work product. The content of work product is not covered by 26(b)(3) (it is not a document or a tangible thing) and yet it has been considered to be work product because it falls under the common law work product privilege created in Hickman. The same might be said of the materials that X and Y gave to P.**
* **Some courts, appealing to the language of 26(b)(3), have held such material not privileged. But, because the reasons for protecting the material are strong (as we shall see), many courts protect it though other means, for example by putting it under a protective order. See Wright & Miller, 8 Federal Practice and Procedure § 2024. Others have argued that the material should fall under the common law privilege in Hickman. See Special Project, The Work Product Doctrine, 68 Cornell L. Rev. 760, 862-64 (1983).**
* **What are the reasons for protecting this material? To answer this question you need to look back to the underlying purposes of the work product privilege. One reason the privilege exists is to protect opinion work product (theories, strategies, and the like). If the material at issue contained these opinions, then there would be good reason to protect it. This is particularly true of Y’s material, since Y may yet enter into litigation with D. D would have an unfair advantage if he could get Y’s opinion work product in discovery in P v. D and then use it in Y v. D. But there is even reason to protect X’s opinion work product. After all, this opinion work product might be useful in connection with other disputes with X. If the material is not privileged, D could give it to the adversaries of X in these disputes.**
* **But it is not that likely that the material contains opinion work product. It is probably solely fact work product. One reason there is a (qualified) privilege for fact work product is the free-rider problem. Without the privilege, each side will wait for the other to do investigation, hoping to get the fruits of this labor in discovery. Does that apply to non-party fact work product? It is hard to see why not. If X’s and Y’s material is freely discoverable in the case of P v. D, D might do no investigation, hoping to free-ride on X’s and Y’s efforts.**
* **Some argued that P was already free-riding on X’s and Y’s efforts, so it is only fair that D should be able to do so as well. Although there is something to this point, P is not really free-riding, since X and Y willing chose to give their material to P (because they share a common adversary).**
* **Another argument for the fact work product privilege is that, without it, parties and their representatives would refrain from committing their work product to paper. That would seem to apply to non-party work product as well. If X and Y are worried that their material will be discoverable in the case of P v. D, they might not commit it to paper.**
* **The final argument is the worry that work product could be freely used to impeach the testimony of witnesses, by pointing to the discrepancy between the statements of those witnesses on the stand and in the work product. Furthermore, the creator of the work product might be required to take the stand to support the version in the work product. This puts the creator in an uncomfortable position, since he might be required to impeach the testimony of witnesses friendly to his client.**
* **This scenario could clearly arise with respect to Y’s work product. Once D gets it in discovery in the case of P v. D, D could use it to impeach Y’s witnesses in the case of Y v. D. One might argue that this scenario is not as much of a problem with respect to X, since X’s action against D has already settled. But it would still be awkward for X’s private investigator to be required to aid X’s former adversary.**
* **Many of you spent time discussing whether the work product privilege could be overcome in this case, through D’s showing a “substantial need of the materials” and that he is “unable without undue hardship to obtain the substantial equivalent of the materials by other means.” But question was whether the material was covered by the work product privilege, not whether the privilege could be overcome.**
* **But the main problem with answers to this question was a failure to discuss the underlying purposes of the work product privilege. Many of you simply said that the material was not covered by 26(b)(3) and left it at that.**

**Mechanisms of Disclosure and Discovery:**

* Disclosure – obligation to turn over material without being asked
* three types
* 26(a)(1)
	+ at the beginning of the discovery period – applies to material “that the disclosing party may use to *support* its claims or defenses, unless the use would be solely for impeachment”
* 26(a)(3)
	+ pretrial disclosure
	+ basically tell the other side what you are going to present at trial, except evidence regarding impeachment
* 26(a)(2) & (b)(4)
	+ disclosure concerning expert testimony
	+ testifying expert must submit a report
	+ includes compensation etc. but most importantly…
	+ material that the expert relied upon to come to opinion even if otherwise privileged, so MUST be careful on what information you give to a testifying expert -

**Discovery methods review**

* **Rule 36: Requests for Admission**
* **Rule 45: Subpoena**
	+ During discovery way of getting non-party to show up to deposition, also way of getting documents from non-party
* **Rule 34:** Producing documents, electronically stored information, and tangible things, or entering onto land, and inspection for other purposes
	+ applies to parties
* **Rule 33:** Interrogatories to Parties:set number of questions
	+ **Useful for getting background notes for what type of document to request**
* **Rule 30. Deposition by Oral Examination**
	+ notice that to keep a deposition from breaking down you should have the deposed party answer a question even if there is an objection
		- You do not want deposition to immediately break down, but if someone is asking for privileged materials, person answering should refuse to answer and deposition might break down
	+ and to keep the other side from overreaching…
		- **30(d)(3) Motion to Terminate or Limit:**
		- **(A) Grounds. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party.**

**E-Discovery 26(b)(2)**

* Way being presented in book is e-discovery makes discovery more burdensome **but Green thinks makes discovery easier on (1) giving materials over (2) going over the materials.**
* new rule for when E-Discovery may create burden – the discoverability of the material takes that burden into account
* 26(b)(2) *Limitations on Frequency and Extent.*
… (B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

**motions to compel, sanctions**

**Hypo:**

* D did not turn over disclosure materials, made frivolous discovery request, and illegitimately refused to turn over materials that were within the scope of your discovery requests – what to do?
* first, every discovery request and discovery/disclosure response is signed and that results in a certification under Rule 26(g) (like Rule 11)
* 26(g) Signing Disclosures and Discovery Requests, Responses, and Objections.
    (1) Signature Required; Effect of Signature.  Every ***disclosure*** under Rule 26(a)(1) or (a)(3) and every ***discovery request, response, or objection must be signed*** by at least one attorney of record in the attorney’s own name — or by the party personally, if unrepresented — and must state the signer’s address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the ***best of the person’s knowledge, information, and belief*** formed after a reasonable inquiry:
        (A) with respect to a ***disclosure***, it is ***complete and correct*** as of the time it is made; and
        (B) with respect to a ***discovery request, response, or objection***, it is:
            (i) consistent with these rules and ***warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law***;
            (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
            (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action....
	+ notice expansive view about what is proper legal refusal to turn over materials
* violation of 26(g) can result in sanctions
    (3) Sanction for Improper Certification.  If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney’s fees, caused by the violation.

But even if the refusal to turn over discovery material is frivolous and results in sanctions under 26(g), how do you get the materials?

* motion to compel

**Rule 37: Failure to make disclosures or to cooperate in Discovery; Sanctions**

1. Motion for an order compelling disclosure or discovery
2. In general
	* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has ***in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery*** in an effort to obtain it without court action.
	* if you the court grants your motion to compel discovery and the party still does not turn over the materials, there will be sanctions that usually amount to losing on that issue

(b)(2) Sanctions in the District Where the Action Is Pending.
(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent ...fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders.
They may include the following:
(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
(iii) striking pleadings in whole or in part;
(iv) staying further proceedings until the order is obeyed;
(v) dismissing the action or proceeding in whole or in part;
(vi) rendering a default judgment against the disobedient party

* on the other hand, if there is a motion to compel disclosure, the court can sanction in conjunction with the motion to compel
	+ 37(c) ***Failure to Disclose***; to Supplement an Earlier Response, or to Admit.
	(1) Failure to Disclose or Supplement.
	If a party fails to provide information or identify a witness as required by Rule 26(a) or 26(e), ***the party is not allowed to use that information*** or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
	(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
	(B) may inform the jury of the party's failure; and
	(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi)
	+ that is because there was an affirmative obligation to turn over the disclosure material without being asked

**Protective Orders**

* if you think material the other side is asking for is not discoverable (eg because privileged), rather than waiting for the other side to bring a motion to compel, you can bring a motion for a protective order
* protective orders also can be used even when material is discoverable, to put on obligation on the other side to protect the privacy of info - eg trade secrets

**End of Discovery**

**Choice of Law and Interpretation of Another Sovereign’s Law**

* When VA court interprets VA law they are making VA law
* BUT when CA or federal court interprets VA state law they aren’t

**Limits on Legislative Jurisdiction**

* we have already discussed personal jurisdiction
	+ that is, when the court of a sovereign has the power to issue a binding judgment against a defendant
* but there is also a question of legislative jurisdiction – the power of a sovereign to legally regulate people, events, transactions, independent of a lawsuit.
* Congress’s legislative jurisdiction over transactions in the US is very broad, almost plenary
* **Hypo:** Congress wishes to protect endangered species by law; does it have power to do so?
	+ Commerce Clause yes
	+ notice how broadly commerce is read!
* **but the SCt has tried to make it look like there are some limits on Congress’s power
Hypo:** Congress wishes to criminally sanction any individual who knowingly possesses a firearm at a place he knows is a school zone—does he have power to do so
	+ here the US SCt drew the line in U.S. v. Lopez (US 1996)
	+ this is not regulating commerce,
	+ this is an area of exclusive state legislative jurisdiction
* but even concerning Congress there are *territorial* limits on legislative jurisdiction
* **Hypo:** Congress wishes to regulate Germans’ driving in Germany
	+ no – Congress does not have such a power beyond US borders
	+ *limit on Congress’s power comes from possibly international law or due process clause of 5th A*
* **same is true of states**
* **Hypo:** New Yorker’s driving in New York, California legislature wants to regulate
	+ No legislative jurisdiction
		- this limitation comes from Due Process Clause of 14th A or Full Faith and Credit Clause
* furthermore, even if something is within the legislative jurisdiction of a sovereign, it may still choose not to exercise its power

The point of this is that there can be cases before a court where the court has personal jurisdiction (the power to issue a binding judgment) but the sovereign behind that court does not have legislative jurisdiction (or if it does it has decided not to exercise its power) – it must respect the other jurisdiction’s law

e.g.

a federal court entertains a state law action, or action under the law of a foreign nation

a state court entertains a federal action, or sister state action, or action under the law of a foreign nation

**OK – what about the duties of a federal court entertaining a state law action…**

**one might think that this is answered by the Rules of Decision 28 U.S.C. § 1652**

* The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as the rules of decision in civil actions in the courts of the United States, in cases where they apply.
* enacted with the creation of federal court system in 1787
* curious law
* not interpreted as saying federal courts don’t have power to create federal common law rules
	+ as we shall see they can to some extent
* There is also no mention of law of other nations
	+ what if it is something that happened in Germany🡪then Germany’s law cannot apply? RDA is not read to mean that state law should be used
* and with respect to state law, RDA seem to simply say what would be true even without the RDA, namely that if federal law does not apply to a US transaction than state law does
* Green has a theory about what the RDA was meant to do, but we will ignore it here
* just remember it is a bit of a mystery

**How to Interpret the Other Sovereign’s Law?**

* One would think that the following is *obvious* –if the question is the common law in California, California Courts are definitive deciders of what their state’s common law is
* but it is not obvious

**Swift v. Tyson**

* **Hypo:** P sues D in federal court in New York concerning commercial paper issued in New York. The Supreme Court held that in interpreting the general common law prevailing in New York, a federal court need not follow opinions of New York state courts.
	+ however concerning local usages (e.g. real property) and New York’s statutes and constitution, the decisions of New York state courts are binding
* **What about the RDA**
	+ **RDA** refers to law of several states are applicable when federal statutes don’t apply, wouldn’t that mean that state decisions would apply here ?
		- Well Story, J. says – “laws” in the RDA refers to state statutes and to common law rules that are local – not to the general common law

**Black and White Taxicab v. Brown and Yellow Taxicab under Swift v. Tyson**

* **Facts:**
	+ Brown and Yellow Taxicab reincorporated in TN to gain diversity jurisdiction. Sued Black and White and Louisville & Nashville Rail Company for breach of contract
		- they had contract with RR to exclusive right to pick up passengers at stations but wasn't being given exclusivity – the RR was allowing Black and White to pick up passengers too
	+ Black and White responded arguing that Brown and Yellow fraudulently obtained diversity by reincorporating, but Court said there is diversity because you look at jurisdiction at time of filing and they obtained jurisdiction legally
		- This wouldn’t work as well now because PPB
	+ Ky state courts had held such a contract invalid
	+ but, using Swift v. Tyson approach, Federal District Courtsays contract is valid under general common law
	+ rules for Brown and Yellow
	+ CoA agrees
	+ SCt affirms
* **Holmes Dissent:**
	+ We should be following KY common law as it is decided by KY state courts
	+ there is no general common law
* Holmes criticism of the general common law takes two forms
* first he claims that the general common law cannot exist because law only exists when an authority stands behind it and no authority stands behind the general common law
* in effect Holmes is saying that Swift confused law and morality
	+ morality can exist and bind people independent of any authority or any social facts about a community
		- e.g. A intentionally kills a 3 year old child, B, without justification, just for fun
		- A and B live in society S, in which people think such acts are morally permissible
		- is A’s action morally permissible?
		- NO – morality is binding in the community no matter what any authority in the community says or what the social facts in the community are
* Green: but Holmes is wrong – the general common law was not thought of as binding in a state independent of state authority
* assume that facts of the Brown & White Taxicab case had taken place in

Louisiana
the Cree Tribe
Turkey

what result?
	+ the general common law would not be applied
	+ why? because the officials in these jurisdictions had not adopted the general common law

**General Common Law is NOT Morality, it is based upon adoption by officials in the jurisdiction and they could rid of the general common law tomorrow if they wanted.**

**in other word the general common law applies in KY because KY officials say so (by adopting a common law system)**

* Here is Holmes’s second argument against Swift: But isn’t it clear that Kentucky officials WANT the courts of other jurisdictions (federal, sister state, and foreign) to follow the decisions of Kentucky courts concerning general common law cases that arise in Kentucky…?
	+ Holmes assumes it is obvious that when KY made State Supreme Court they wanted its decisions to be binding, not just on KY state courts, but also on federal and sister state courts when dealing with questions of common law in KY
	+ **“If a State Constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United States to refuse to follow what the State Court decided in that domain. But when the Constitution of a State establishes a Supreme Court it by implication does make that declaration as clearly as if it had said it in express words, so far as it is not interfered with by the superior power of the United States.”**
* Green: Holmes is **wrong.**
* First, how do we know when KY Courts want their decisions to be binding upon federal and sister state courts? 🡪
	+ there will be no KY state court case saying so either way
	+ KY state courts would never have occasion to talk about what federal and sister state courts should do – they only talk about what they should do since that is the only thing relevant to th case before them
* But to the extent that there was evidence from state courts, it was in favor of Swift
* **move the facts of the Black and White case to Tennessee (that is, it is a Tennessee contract is at issue) and a Kentucky state court is addressing the case
would it defer to the decisions of Tennessee courts…?**
	+ For a long time, it would *not* defer to TN state courts concerning the general common law in TN
	+ that suggests that KY state courts thought the general common law in KY is also independent of the decisions of KY state courts
	+ the idea is that common law jurisdictions (KY, TN, NY, England, S Africa) each chose to adopt a standard that they thought was common to all common law jurisdictions and concerning which the court of any common law jurisdiction could get wrong.
* **In fact, states started moving from a Swift understanding of the general common law to an Erie understanding between Swift and Erie:**
	+ **Connecticut: deferred to sister states courts concerning the content of the common law in the states pre-Swift**
	+ **Pennsylvania: moved to deferring to sister state courts around 1880**
	+ **Georgia: *still* does not defer**
		- GA courts say the content of the common law is standard in all common law states is independent of what the courts in those states say it is
		- Georgia courts still will come to their own decision regarding content of the common law in a sister state
* Should federal courts adopt a State by State approach…?
	+ use a Swift approach for GA, Erie for PA, CT?
* that is tough because it is so hard to figure out what a state’s views are – it makes sense that the SCt used a general approach
* but the general approach used in Swift was in keeping with what most common law states thought of the general common law at the time
	+ - At time Swift v. Tyson was rightly decided
* Green says Erie is rightly decided **for its time**
	+ most common law states have an Erie view of the common law now

**Even if Swift was right when decided it did cause Vertical Forum Shopping**

* but the fact that state courts had a Swiftian view too means that there would be horizontal forum shopping problem even if federal courts abandoned Swift v. Tyson

**Difference between FCL and GCL**

* **Federal Common Law:** Law created by federal courts in area of federal interests, and binding upon state courts. Federal courts make common law to serve some federal regulatory purpose
* **Example of Federal Interest:**
	+ *Hinderlider v. La Plata River & Cherry Creek Ditch Co*., 304 U.S. 92, 110 (1938) (Brandeis, J.)  describing apportionment of water from the La Plata River between Colorado and New Mexico as “a question of ‘federal common law’ upon which neither the statutes nor the decisions of either State can be conclusive”
	+ nothing to solve the case was in a federal statute or US Constitution. So Federal Common Law Rule created:
		- *This federal common law rule will be binding on state courts*

**There may be federal interest giving a federal court common law making power, but diversity or supplemental jurisdiction itself does not create such an interest.**

* **General Common Law:** Nothing to do with federal officials, broad standard applicable in all common law jurisdictions, and binding upon jurisdiction if officials in the jurisdiction choose to accept it

**Erie R.R. v. Tompkins**

 **Facts**

* + Guy walking along rail road, gets hit by door
* **Issue**
	+ What level of duty is owed to trespasser🡪matter of **common law**
	+ Whether there is negligence standard on R.R. or recklessness standard
* **Outcome**
	+ **Pre-Erie:** Would treat as matter of GCL and not defer to Pennsylvania courts
	+ **Post Erie:** refer Pennsylvania common law as PA courts would interpret it
* Not just with respect to statutes and local usages, but for all common law, we refer to what the state’s courts say about the common law in their state
* **3 Justifications for conclusion offered by Brandeis in Erie:**
	+ (1) “Laws” in RDA means all laws including all common law —statutory solution,
	+ (2) Swift was bad because you could get different decision with vertical forum shopping. So Erie fixes this by creating vertical uniformity between federal and forum state courts.
		- in Blck & White Taxicab Out of state litigants lose their advantage of diversity by being able to choose between federal and state that two Kentuckians would not get
	+ (3) Swift v. Tyson is unconstitutional🡪**green says wrong**
		- Problems with this reason: under Swift federal courts were doing what the states want them to do so how is this wrong? State courts expected federal courts to come to an independent judgment about the general common law in their state.
* **Issue Moving Forward:** In diversity/alienage/supplemental jurisdiction cases, federal courts will have power over procedure, but not over substance. So new problem is figuring out difference between procedure and substance
* **Upshot of Erie:** When entertaining a state law cause of action (e.g. in diversity, supplemental jurisdiction) the federal court should apply state law as interpreted by that state’s courts . . . this applies to common law cases too!

**In Light of Erie, how do We Interpret State Law?**

* Binding nature of state decisions in the state court system
	+ New decision announced by VA trial court
		- **Not binding authority anywhere**🡪nobody is obligated to respect that opinion, not even that same VA trial court
		- **s**trong precedential value for another VA trial court
			* but they **can overrule** themselves
		- A mere source of arguments for Va Ct App or the Va Supreme Court
	+ Va Ct App asserts new decision on Va law
		- **Binding authority over VA trial courts,** such trial courts are obligated to follow that App Ct.’s decision even if legal circumstances have changed and the appellate courts would surely decide if differently now
		- **Precedential Value for VA Ct App**
		- Will strongly suggest how the law should be decided, but a VA Ct App *could decide differently* – could overrule itself
		- **A mere source for arguments** for the VA Supreme Court
	+ The VA Sct issues a new rule of VA law
		- **Binding authority over trial courts and appellate courts within the state of VA**
		- Such courts are obligated to follow the VA SCt decision even if legal times have change
		- **Precedential value for the VA SCt**
		- Will strongly suggest how the law *should be decided, but the Va Sct could decide differently*
* **This system is true of US SCt decisions too**
	+ **There is an old US SCt case on point that says X.
	A state court or lower federal court feels that the US SCt would say *not-X* now.

	Can the state court or lower federal court decide not-X?**
	+ **NO – but let USSCt overrule itself**
* should a federal court deciding a matter of state law act like a lower state court and follow all state SCt cases?
* **Hypo:** P sues D in Federal Court in diversity under Penn law, last Penn decision is 80 years old in Penn S.Ct, it looks like they would decide otherwise now, does the federal court follow the decision?
	+ the problem is that there is no appeal from Federal Court to the Penn Supreme Court
	+ What should it do? To try and make things turn out as similar as possible in federal court as states court Federal Court should interpret PA law the way they think it would PA SCt would now
	+ **Not Swift v. Tyson – the federal court is predicting what the PA SCt would say**